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The Doctor's Company v. G. Gregory Drezga, MD and Heidi J. Judd, personally and as the natural parent and guardian of Athan Montgomery, for and on behalf of Athan Montgomery : Opening Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE DOCTORS' COMPANY, Plaintiff and Appellant, v. G. GREGORY DREZGA, MD and HEIDI J. JUDD, personally and as the natural parent and guardian of ATHAN MONTGOMERY, for and on behalf of ATHAN MONTGOMERY. Defendants and Appellees.	Appellate Case No. 20080514

OPENING BRIEF OF APPELLEE DREZGA

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PARTIES TO THIS APPEAL

The plaintiff and appellant is The Doctors Company ("TDC"), an insurance company. There are two defendants and appellees: G. Gregory Drezga, MD, the named insured on a TDC policy for medical malpractice; and Ms. Heidi Judd, personally and on behalf of her son, Athan Montgomery.

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OPENING BRIEF OF APPELLEE DREZGA

JURISDICTION

The Utah Supreme Court possesses jurisdiction, pursuant to Utah Code Section 78A-3-102(3)(j) (2008), over this appeal of the orders and final judgment of the Third Judicial District Court.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Summary judgment was properly entered by the district court in favor of Appellees pursuant to Rule 56 of the Utah Rules of Civil Procedure. Among the statutory provisions that may be relevant include Utah Code Sections 31A-21-105, 31A-21-106, and 31A-21-303.

STATEMENT OF THE CASE

The ultimate responsibility of this Court will be to assign loss arising from the tragic circumstances of Athan Montgomery's birth. The parties to this case include The Doctors Company ("TDC"), which seeks to invalidate a professional liability insurance policy that it issued in 1996; Dr. G. Greggory Drezga ("Dr. Drezga" or "Drezga"), who applied for and obtained the insurance policy to cover his medical practice; and Athan Montgomery, who had the misfortunate to be born under tragic circumstances that led to a malpractice action and judgment against Dr. Drezga.

This lawsuit, which began nearly a decade ago, represents an enduring campaign by an insurer to avoid paying a valid and significant claim against the professional liability policy that it issued to Dr. Drezga. TDC launched this declaratory action against the empty chair of TDC's insured: owing to Dr. Drezga's unexplained absence, TDC sought to be excused from maintaining its coverage of Dr. Drezga because of his alleged "non-cooperation." Next, TDC cancelled the policy and sought to deny coverage based on alleged misrepresentations that it discovered upon review of Dr. Drezga's application for malpractice insurance. TDC subsequently sought and currently seeks to re-characterize its termination of the policy as a rescission in order to deny coverage Finally, TDC challenges the order entered by the district court that held it responsible for the legal fees incurred by the court-appointed attorney for Dr. Drezga.

The district court entered summary judgment against TDC. On appeal, TDC asks this Court to transfer TDC's financial loss to its absent insured, Dr. Drezga. Reversal would likely leave Dr. Drezga without the means to satisfy the judgment against him.

FACTUAL RECORD

Twice before, this Court has grappled with issues arising from the tragic circumstances of Athan Montgomery's delivery and birth. Given that the briefs of Appellant TDC and Appellee Judd both retread this ground, and given the Court's previous exposure to the general factual background, the utility of repeating this exercise would likely be limited.

Instead, given the allegations made by TDC against Dr. Drezga, it is notable and important to highlight the absence of certain facts from the record before this Court. For example, consider the following:

- There is no evidence in the record indicating that Dr. Drezga has ever been aware of the malpractice suit that was brought against him.
- There is no evidence in the record to suggest that Dr. Drezga disappeared in a purposeful attempt to evade the malpractice action.
- There is no evidence in the record to indicate that Dr. Drezga intentionally failed to assist in the defense of the malpractice action.
- There is no evidence in the record to demonstrate that Dr. Drezga declined to appear at any proceeding during the malpractice action.
- There is no evidence in the record indicating that Dr. Drezga has ever been aware of the declaratory action brought against him by TDC.

SUMMARY OF ARGUMENT

In its appeal, TDC asks the Court to reverse the judgment of the district court and retroactively rescind the medical malpractice insurance coverage TDC provided to Dr. Drezga. However, public policy militates against this result, given that the purpose of medical malpractice insurance is to fulfill the twin goals of protecting the insured from the financial consequences of his or her clinical errors while simultaneously providing financial compensation to those patients injured as a result of those errors. Here, the end result of allowing TDC to retroactively rescind Dr. Drezga's coverage would be to punish those parties that relied on such coverage, namely, Dr. Drezga himself. Indeed, because insurance companies are in the best position to evaluate whether an applicant qualifies for coverage, public policy dictates that TDC's retroactive rescission argument be rejected.

Second, TDC's contention that Dr. Drezga violated his duty of cooperation is unfounded, namely because there is no evidence to suggest that Dr. Drezga ever became aware of (let alone failed to cooperate in the defense of) the medical malpractice claim brought against him. Much like a deceased, disabled, or incapacitated person, Dr. Drezga's absence does not equate to non-cooperation and TDC's argument to that effect should be rejected.

Third, where, as here, the district court appointed counsel to represent Dr. Drezga's interests, it is appropriate that the fees for such counsel be paid by TDC, particularly given that TDC has failed to repay the premiums funded by Dr. Drezga and arguably has used those premiums to fund the case against him. Thus, in this unique

situation, this Court should affirm the district court's conclusion that TDC is responsible for paying Dr. Drezga's defense costs.

ARGUMENT

I. TDC SHOULD NOT BE PERMITTED TO RETROACTIVELY AND BELATEDLY RESCIND ITS INSURANCE COVER AGE OF DR. DREZGA.

This Court should bring this longstanding case to a just conclusion by affirming the district court's entry of summary judgment against TDC. The district court correctly concluded that TDC may not retroactively rescind its coverage of Dr. Drezga for 1997 since TDC elected instead to cancel its policy with Dr. Drezga.[1]

Public policy supports this result. Rescission in this case would thwart the purpose of insurance; namely, to protect the insured from the financial consequences of professional errors while providing adequate compensation to innocent victims of medical malpractice.

TDC justified its cancellation of Dr. Drezga's policy on the basis of alleged misrepresentations made by Dr. Drezga in his application for insurance. What is not known is whether these alleged errors resulted from innocent mistake, misunderstanding, or confusion, or whether these misrepresentations were truly the product of malicious intent. It is at least possible that the foreign-born Dr. Drezga misunderstood what information was sought, given the legalistic language of the insurance application. For a person without a native command of the English language, it is at least conceivable that

[1] Rather than reiterate the applicable legal analysis, Dr. Drezga joins Section 1 of Appellee Judd's brief.

confusion over a verb tense—perhaps, say, misunderstanding whether the question wanted to know whether he was presently involved in a malpractice case, as opposed to whether he had previously been involved in such a case—could have led Dr. Drezga to have inadvertently provided inaccurate information. Since TDC notes that Dr. Drezga had prior malpractice claims that settled, it is possible that Dr. Drezga may not have disclosed those incidents out of a belief that he had an obligation to maintain the confidentiality of those settlements.

Thus, based on the posture of this case, this Court is left with a record where it must be assumed, *arguendo*, that Dr. Drezga's application contained misrepresentations. While TDC conveniently attests that it would not have extended a policy to Dr. Drezga had it been aware of these misrepresentations (see R. 175-199), such testimony may be nothing more than retroactive speculation. Perhaps Dr. Drezga could have provided an adequate explanation for the apparent inaccuracies. Perhaps TDC would have nevertheless been willing to issue a policy in exchange for a greater premium.

What is certain is that retroactive rescission in this case would punish the parties that relied on TDC's issuance of insurance to Dr. Drezga. For starters, once armed with a policy from TDC, Dr. Drezga had no reason to seek other insurance. Presumably he engaged in his practice of medicine believing that TDC would both protect his interests and provide for his patients in the event of tragedy. So, too, did Dr. Drezga's employer rely on the fact that TDC had issued insurance to cover his medical practice. Most tragically of all, Heidi Judd came to rely on the fact that her physician was covered by malpractice insurance.

This Court should not permit TDC to retroactively rescind Dr. Drezga's insurance policy, lest the insurance industry view such an outcome as an invitation to skimp on the applicant screening process. After all, if insurers believed that they could retroactively rescind their policies by discovering misrepresentations after the inception of a malpractice case, insurers would have less incentive to commit precious resources to the initial screening process. Indeed, a potential insurer, at the time it receives an application for insurance, is in the best position to investigate the applicant and potentially prevent a chain of tragic reliance. For this reason, it is vital that Utah law provide incentive for insurers to invest the time and resources necessary to screen applicants before issuing professional liability insurance.

II. THE DISAPPEARANCE OF DR. DREZGA DOES NOT CONSTITUTE NON-COOPERATION.

This Court should reject TDC's contention that, by sole virtue of his disappearance, Dr. Drezga violated his contractual obligation under the policy to cooperate in the defense of the malpractice claim against him. There is absolutely no evidence in the record to suggest that Dr. Drezga ever became aware of the malpractice action. Nor is there any evidence that might suggest that Dr. Drezga disappeared in order to avoid a lawsuit against him. The singular fact in the record is this: Dr. Drezga has simply vanished.

The unexplained disappearance of Dr. Drezga should not provide TDC with an excuse to terminate his insurance policy. An insurer's duty to defend its insured survives the death of its insured; it endures during any period of an insured's disability; and it

continues notwithstanding the incapacity of its insured. TDC has not been so bold as to suggest that an insurer could escape its contractual responsibilities in these circumstances based on the non-cooperation of the dead, disabled, or incapacitated. After all, one of the very purposes of insurance is to safeguard individuals, their estates, injured third parties, and society from the consequences of these calamities. By the same reasoning, the unavailability of Dr. Drezga should not permit his insurer to disclaim valid claims against Dr. Drezga's insurance policy.

III. TDC SHOULD BE RESPONSIBLE FOR THE LEGAL FEES INCURRED TO SUCCESSFULLY DEFEND ITS INSURED FROM TDC'S DECLARATORY ACTION.

This Court should affirm the district court's order to ensure that Dr. Drezga's court-appointed counsel may be fairly compensated for defending Dr. Drezga from this declaratory action filed by TDC. The singular distinguishing factor of this case is the absence of Dr. Drezga and TDC's decision to pursue litigation against the empty chair of its insured.

This Court should reject TDC's suggestion that an impermissible conflict would result from its payment to the attorney appointed by the district court to represent its absent insured. TDC contends that:

> were he present, it is hard to believe that [Dr.] Drezga would accept the services of counsel paid by his adversary. Such counsel would have an immediately apparent conflict of interest in serving two diametrically-opposed masters.

See Aplt. Br. at 62.

This contention betrays a fundamental misunderstanding of Utah's Rules of Professional Conduct. Dr. Drezga's counsel owes his duty of loyalty to Dr. Drezga. Assuming that Dr.Drezga—or an appropriate court—consented to allow his counsel to be paid by a third-party, as is permissible under the governing ethical rules, Dr. Drezga's counsel's duties are owed solely to Dr. Drezga. The payment of fees does not transform a third-party payer into a client. Dr. Drezga's counsel would not have two masters.

TDC also relies on *Travelers Indemnity Company of Connecticut v. Mayfield*, 923 S.W.2d 590 (Texas 1996). In *Mayfield*, the Texas Supreme Court reversed a district court order that had compelled an insurance carrier to pay the litigation costs for counsel for a workers' compensation plaintiff in a dispute between the parties. The *Mayfield* court held that the district court had abused its discretion and exceeded its inherent authority when it ordered the payment of attorneys' fees in the absence of an authorizing statute or contract.

It is not surprising that TDC touts *Mayfield* as persuasive authority. But the present circumstances are both extraordinary and clearly distinguishable from *Mayfield*. First, the insurer in *Mayfield* was not pursuing action against a missing party. Second, unlike here, the adjudication of the parties' rights in *Mayfield* would have little effect on third parties. Third, the insurer in *Mayfield* did not first cancel its insured's coverage before seeking to rescind it. Fourth, the *Mayfield* court refused to pay up-front costs of litigation, whereas affirmance of the district court's order here would result in payments to Dr. Drezga's counsel only after the successful defense of Dr. Drezga's interests.

Additionally, though the insurer in *Mayfield* objected to an order compelling it to fund its adversary, the insurer had not retained funds belonging to its insured. In this case, TDC argues that "Funding for Drezga's defense in this lawsuit, if it is to be obtained at all, should come from a source other than TDC." Aplt. Br. at 63. This position is somewhat ironic because, due to TDC's original retention of Dr. Drezga's premiums, the funding for TDC's attack on Dr. Drezga's contractual rights could be said to have begun with funding from Dr. Drezga. To be sure, TDC also argues that "[a] refund of policy premiums was not feasible due to Drezga's disappearance." Aplt. Br. at 17. Yet TDC did not pay the premiums into the court. Nor did TDC convey these funds to the State of Utah as lost or unclaimed property. Instead, TDC retained these funds and initiated legal action against its missing insured. Thus it could fairly be said that TDC kept Dr. Drezga's money and used it to fund litigation against him *in absentia*.

Finally, given that the district court agreed that TDC's attack on Dr. Drezga's contractual rights was without merit, fundamental fairness and equity suggest that TDC should bear the costs of the defense rather than the prevailing party. This Court should affirm that TDC is responsible for paying the costs of defense incurred by Dr. Drezga's court-appointed counsel.

CONCLUSION

For the reasons explained above and in the brief of Appellee Judd, the orders and judgment of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 12th day of March, 2009.

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for

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March, 2009, a true and correct copy of the foregoing OPENING BRIEF OF APPELLEE DREZGA was mailed, postage prepaid, to the following:

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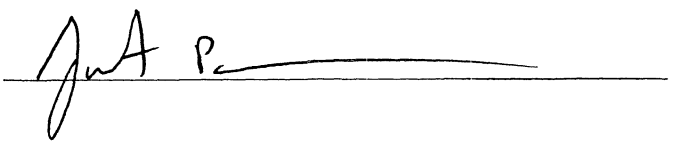

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